

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA

DOCKET NOS. 2003-326-C and 2003-327-C - ORDER NO. 2004-504

OCTOBER 18, 2004

IN RE: Docket No. 2003-326-C – Analysis of	)	ORDER DENYING
Continued Availability of Unbundled Local	)	MOTION TO HOLD
Switching for Mass Market Customers	)	PROCEEDINGS IN
Pursuant to the FCC’s Triennial Review	)	ABEYANCE AND
Order	)	OPENING RECORD TO
	)	RECEIVE TESTIMONY
and	)	AND EXHIBITS
	)	
Docket No. 2003-327-C – Availability of	)	
Unbundled High Capacity Loops at Certain	)	
Locations and Unbundled High Capacity	)	
Transport on Certain Routes Pursuant to the	)	
FCC’s Triennial Review Order	)	

This matter comes before the Public Service Commission of South Carolina (the “Commission”) on the Motion to Hold Proceedings in Abeyance filed by BellSouth Telecommunications, Inc. (“BellSouth”). Responses to BellSouth’s Motion have been filed by the Consumer Advocate for the State of South Carolina (“Consumer Advocate”), the South Carolina Telephone Coalition (“SCTC”), and the Competitive Carriers of the South (“CompSouth”). The Consumer Advocate and the SCTC support BellSouth’s Motion to hold the proceedings in the instant dockets in abeyance while CompSouth opposes BellSouth’s Motion and requests that the Commission continue with the proceedings as scheduled.

The underlying basis for BellSouth's Motion to hold the proceedings in these dockets in abeyance is the March 2, 2004, opinion of the D.C. Circuit Court of Appeals ("D.C. Circuit") which negates the underpinnings of the Federal Communications Commission's ("FCC's") *Triennial Review Order*. In the *Triennial Review Order*, the FCC delegated to state commissions the task of applying various triggers and other analysis developed by the FCC to determine the extent to which certain loop, transport, and switching facilities will remain unbundled network elements ("UNEs") in South Carolina and other states. Applying the triggers and other analysis that the FCC developed requires state commissions to consider a great deal of carrier-specific information at a "granular" level including, without limitation: the number of competing carriers serving specific customer locations with their own loop transmission facilities at certain loop capacity levels; the number of competing carriers that have deployed transmission facilities to specific customer locations and that are offering alternative loop facilities to competing carriers on a wholesale basis at the same capacity level; the number of competing carriers that have deployed non-incumbent LEC transport facilities along a specific route; the number of alternative transport providers immediately capable and willing to provide competing carriers with transport at specific capacity along a given route between incumbent LEC switches or wire centers; the number of competing carriers serving mass market customers in a particular market with the use of their own switches; and the number of competing carriers that offer wholesale switching service for a particular market using their own switches. The FCC expected the state commissions to

apply these various triggers and other analysis and make various findings within nine months of the effective date of the *Triennial Review Order*.

The D.C. Circuit in its opinion of March 2, 2004, severely undermined and struck portions of the FCC's *Triennial Review Order* that are relevant to the proceedings scheduled before this Commission. The D.C. Circuit summarized its opinion in the following language:

We vacate the [FCC's] subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements.

We vacate the [FCC's] decision not to take into account availability of tariffed special access services when conducting the impairment analysis, and we therefore vacate and remand the decision that wireless carriers are impaired without unbundled access to ILEC dedicated transport.

We vacate the [FCC's] distinction between qualifying and non-qualifying services, and remand (but do not vacate) the decision that competing carriers are not entitled to unbundled EELs for provision of long distance exchange service.

\* \* \*

As to the portions of the Order that we vacate, we temporarily stay the vacatur (i.e., delay issue of the mandate) until no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from today's date. This deadline is appropriate in light of the [FCC's] failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings.

USTA v. FCC, \_\_\_ F.3d \_\_\_, 2004 WL 374262 at \*40 (D.C. Cir. March 2, 2004) (emphasis added).

BellSouth asserts that the Commission should hold its scheduled proceedings in abeyance until some clearer and legally sufficient direction is given as to the best course

of action. BellSouth offers that it would be a waste of limited time and resources for the Commission and the parties to continue with the proceedings given the opinion of the D.C. Circuit. Further, it is impossible to tell whether these proceedings, as presently structured, will even address the issues that will be relevant once the Commission and the parties receive clear direction as to what has been done by the D.C. Circuit's opinion. BellSouth asserts that the only thing that is clear at this point is that the discovery that has been conducted and the testimony that has been filed in these proceedings address standards that the D.C. Circuit has held to be "unlawful," "analytically insubstantial," and "based on a fundamental misreading of the relevant caselaw."

BellSouth also points to action of other state commissions which have held their *Triennial Review Order* ("TRO") proceedings in abeyance. BellSouth points to actions of the Florida Commission, the Georgia Commission, the Kentucky Commission, the Louisiana Commission, the Mississippi Commission, and the North Carolina Commission where these commissions have altered their scheduled proceedings in light of the D.C. Circuit's opinion.

While the Commission has received responses from the Consumer Advocate and the SCTC supporting the Motion to Hold the Proceedings in Abeyance, CompSouth has filed comments requesting that the proceedings be continued as scheduled. CompSouth asserts that the record in these two dockets is nearly ready for Commission review through the hearing. CompSouth states that parties have completed several months of discovery and have also completed two rounds of prefiled testimony in the switching case and the first round of prefiled testimony in the loop transport case. CompSouth states that

all that will remain to complete the record in these two cases will be the last round of testimony in each case and a relatively short hearing and briefing by the parties.

CompSouth further asserts that the D.C. Circuit's opinion does not prevent this Commission from going forward with these cases. While the D.C. Circuit has stayed enforcement of its order vacating the TRO until a hearing for rehearing or rehearing en banc, or 60 days, whichever is later, CompSouth asserts that no mandate has been issued and the TRO is still in effect. CompSouth further asserts that it would be critical for state commissions to move forward with the state-specific investigatory and fact-finding role contemplated by the TRO. According to CompSouth, the D.C. Circuit did not make any finding of non-impairment and did not direct the FCC to make any such finding. Therefore, CompSouth asserts that nothing in the D.C. Circuit's opinion suggests that evidence of actual deployment of facilities is irrelevant or would be irrelevant under any standard to be adopted by the FCC. In the event that the matter would be remanded to the FCC for a re-examination of the issues, the FCC would need to base any further findings on the granular, market-specific factual findings which could be provided by the state commissions. CompSouth suggests that states that fail to move forward and develop an evidentiary record that can be shared with the FCC will be rendered mute and irrelevant in any such FCC review. CompSouth notes that the New York Commission has already decided to proceed with hearings, notwithstanding the D.C. Circuit's decision. Further, CompSouth asserts that this Commission retains full jurisdiction and authority under both state and federal law, independent of the TRO, to consider and order unbundling. CompSouth further urges the Commission to go forward to explore and address problems

that would ensue from elimination of UNE-P. The factual record compiled in the Commission's proceedings would shed considerable light on the nature of the wholesale market for UNE-P, UNE-L, and related network elements for the mass market, and on the adverse consequences to consumers of granting requests to eliminate UNE-P. CompSouth therefore urges the Commission to proceed with the scheduled hearing and to develop a record in these dockets.

Upon consideration of BellSouth's Motion and the responses thereto, the Commission hereby denies BellSouth's Motion to hold the proceedings in this matter in abeyance. However, because of the uncertainty created by the D.C. Circuit's opinion of March 2, 2004, the Commission finds that the proceedings scheduled in these dockets should be altered. Therefore, the Commission will open the record of these proceedings to receive prefiled testimony and exhibits. To submit prefiled testimony and exhibits into the record, parties to these dockets shall file verification statements from witnesses and errata sheets detailing any changes or inconsistencies to the prefiled testimony and exhibits by not later than 4:45 p.m. on April 12, 2004. No witnesses or parties need be present on April 12, 2004. The hearing in this matter shall be continued indefinitely, and the record shall be held open pending further action of the Federal Courts or of the FCC which may clarify this Commission's role in these proceedings. Further, parties are hereby directed to continue with discovery pending final disposition of this case, and the parties shall also complete prefilings of testimony and exhibits for submission into the record.

IT IS THEREFORE ORDERED THAT:

1. The Motion to Hold Proceedings in this matter in Abeyance filed by BellSouth is denied.

2. The procedure for the proceedings in these dockets is altered as follows:  
(a) parties may submit prefiled testimony and exhibits into the record of these proceedings; (b) to submit prefiled testimony and exhibits into the record, parties shall file verification statements from witnesses and errata sheets detailing any changes or inconsistencies to the prefiled testimony and exhibits by not later than 4:45 p.m. on April 12, 2004; (c) no witness or parties need be present for a hearing on April 12, 2004; and (d) the hearing in this matter shall be continued indefinitely, and the record shall be held open pending further action of the Federal Courts or the FCC which may clarify this Commission's role in these proceedings.

3. The parties are directed to continue with discovery pending final disposition of this case, and the parties shall also complete the prefiling schedule for testimony and exhibits so that testimony and exhibits may be submitted into the record.

(SEAL)